Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-816

DAVID BELL,

Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY,

Appellee.

APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-816

DAVID BELL,

Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY,

Appellee.

APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(a), 1(b) and 1(d) of the Rules of this Court, appellee moves that this appeal be dismissed or, alternatively, that the judgment of the state court be affirmed.

Opinions Below

The June 8, 1978 order of the N.Y. Court of Appeals is reported at 44 N.Y.2d 647, 407 N.Y.S.2d —— (1978) and is set forth in the appendix to this motion, *infra* p. 17.

The April 6, 1978 opinion of the N.Y. Appellate Division, Third Department, is reported at 62 A.D.2d 1066,

403 N.Y.S.2d 804 (1978) and is set forth in the appendix to this motion, *infra* pp. 18-21.

The January 27, 1977 opinion of the N.Y. Appellate Division, Third Department, is unreported and is set forth in the appendix to this motion, *infra* p. 21.

The March 29, 1976 opinion of the N.Y. Supreme Court, Sullivan County, is unreported and is set forth in the appendix to this motion, *infra* pp. 22-23.

The May 22, 1975 opinion of the N.Y. Appellate Division, Third Department, is reported at 48 A.D.2d 83, 367 N.Y.S.2d 875 (1975) and is set forth in the appendix to this motion, *infra* pp. 24-25.

The December 17, 1974 opinion of the N.Y. Supreme Court, Albany County, is unreported and is set forth in the appendix to this motion, *infra* pp. 26-28.

The October 29, 1974 opinion of the N.Y. Supreme Court, Rensselaer County, is unreported and is set forth in the appendix to this motion, *infra,* pp. 29-30.

Jurisdiction

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (2), this being an appeal which draws into question the validity of New York Alcoholic Beverage Control Law § 106.6, on the ground that it is repugnant to the Constitution and the laws of the United States.

Section 106.6 of the New York Alcoholic Beverage Control Law is found in Volume 3 of McKinney's Consolidated Laws of New York, at page 47 of the 1977-78 Cumulative Annual Pocket Part, and provides:

> 6. No person licensed to sell alcoholic beverages shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly. The use of the licensed premises, or any part thereof, for the sale of lottery tickets, playing of bingo, or both, when duly authorized and lawfully conducted thereon, shall not constitute gambling within the meaning of this subdivision.

Appellant seeks review of the order of the New York Court of Appeals denying his motion for leave to appeal to it a judgment of the New York Appellate Division, Third Department, unanimously confirming two determinations made by the New York State Liquor Authority, the first of which ordered a thirty day suspension of appellant's restaurant liquor license and payment of the bond filed with the Authority to the extent of one thousand dollars, the second of which ordered revocation of appellant's license and payment of the bond filed with the Authority to the extent of one thousand dollars.

The order of the New York Court of Appeals was made on June 8, 1978 and was entered in the Sullivan County Clerk's office on June 14, 1978. The judgment of the New York Appellate Division, Third Department, was made on April 6, 1978 and was entered in the Sullivan County Clerk's office on April 12, 1978.

Questions Presented

Appellant's jurisdictional statement does not formally state the questions presented by this appeal. Appellee believes that the issues raised are fairly expressed as follows:

1. Is N. Y. Alcoholic Beverage Control Law § 106.6 unconstitutionally vague?
2. Were the charges against the appellant either brought or sustained on the basis of ex post facto regulations?
3. Was the appellant denied an opportunity to present evidence of discriminatory and selective enforcement by the New York State Liquor Authority?

Statement

On March 1, 1974, The New York State Liquor Authority issued to the appellant a Restaurant Liquor License.

As a prerequisite to the issuance of the license, the appellant filed with the Authority a surety bond in the amount of $1,000.00, condtioned that the surety would pay such amount to the people of the State of New York upon the appellant's violation of the Alcoholic Beverage Control Law or of the Rules of the State Liquor Authority.

1. First Revocation Proceeding.

By Notice of Pleading and Hearing dated August 7, 1974, the appellee Authority instituted a proceeding pursuant to sections 118 and 119 of the Alcoholic Beverage Control Law to revoke appellant's license on the following charge:

> "That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he suffered or permitted the licensed premises to become disorderly on July 13, 1974, in that he suffered or permitted lewd and indecent performances thereon."

A statutory hearing was held on September 13, 1974 and October 4, 1974.

During the course of the hearing, the charge was amended to include the date of July 14, 1974; testimony and evidence were received in support of the charge; the appellant appeared and was permitted to and did cross-examine the Authority's witness testifying in support of the charge; and appellant was permitted to and did present evidence in his own behalf.

After the completion of the statutory hearing, a summary of the evidence adduced at the aforesaid hearing was prepared for the Members of the Authority. On June

11, 1975, the Members of the Authority referred the entire proceeding to Counsel to prepare proposed findings.

At their meeting held on October 16, 1975, the Members of the Authority adopted the findings drafted by William E. Bandon, Counsel.

Final consideration was deferred pending the referral of the hearing officer's findings in a hearing concluded on August 20, 1975, held in connection with a second revocation proceeding against the appellant.

2. Second Revocation Proceeding

By Notice of Pleading and Hearing dated July 23, 1975, the respondent Authority instituted a second proceeding pursuant to sections 118 and 119 of the Alcoholic Beverage Control Law to revoke appellant's license on the following charges:

> "1. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he suffered or permitted the licensed premises to become disorderly on July 3, 1975-July 4, 1975, in that he suffered or permited lewd and indecent performances thereon.
>
> 2. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he permitted the licensed premises to become disorderly in that on July 3, 1975-July 4, 1975, the licensee permitted patrons and/or employees to bring upon the licensed premises narcotics and/or dangerous drugs.
>
> 3. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law by suffering or permitting the licensed premises to become disorderly in that he suffered or permitted solicitation for immoral purposes on the licensed premises on July 3, 1975-July 4, 1975.

4. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he suffered or permitted the licensed premises to become disorderly on July 3, 1975-July 4, 1975, in that he suffered or permitted the licensed premises to be used for the purposes of promoting prostitution thereon.

5. That the conduct of the licensee leading to his arrest on July 4, 1975 for violations Section 120.25 of the Penal Law of the State of New York (Reckless Endangerment—First Degree); Section 110.00 of the Penal Law of the State of New York (Attempt To Commit A Crime—Murder First Degree); Section 195.05 of the Penal Law of the State of New York (Obstructing Governmental Administration) and Section 205.30 of the Penal Law of the State of New York (Resisting Arrest) was of such improper nature as to warrant revocation, cancellation or suspension of his license pursuant to Rule 36, Paragraph N of the Rules of the State Liquor Authority (9 NYCRR 53.1[n])."

A statutory hearing was held on August 7, 1975 and August 20, 1975. The petitioner was present thereat and was represented by counsel; testimony and evidence were received in support of the charges; petitioner was permitted to and did cross-examine the witnesses testifying in support of the charges and petitioner was afforded the opportunity to and did present evidence in his own behalf.

After the completion of the second revocation hearing and after due consideration of the testimony and evidence presented thereat, the hearing officer prepared for the consideration of the Members of the Authority a report of his findings. The State Liquor Authority's determination is discussed *infra*, p. 9.

3. Renewal Interview

On July 23, 1975, the respondent Authority also served the petitioner with a Notice of Interview in connection with the application of the petitioner for the renewal of the license at said premises for the following reasons:

"1. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he suffered or permitted the licensed premises to become disorderly on July 3, 1975-July 4, 1975, in that he suffered or permitted lewd and indecent performances thereon.

2. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he permitted the licensed premises to become disorderly in that on July 3, 1975-July 4, 1975, the licensee permitted patrons and/or employees to bring upon the licensed premises narcotics and/or dangerous drugs.

3. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverge Control Law by suffering or permitting the licensed premises to become disorderly in that he suffered or permitted solicitation for immoral purposes on the licensed premises on July 3, 1975-July 4, 1975.

4. That the licensee violated Section 106, subdivision 6 of the Alcoholic Beverage Control Law in that he suffered or permitted the licensed premises to become disorderly on July 3, 1975 July 4, 1975, in that he suffered or permitted the licensed premises to be used for the purposes of promoting prostitution thereon.

5. That the conduct of the licensee leading to his arrest on July 4, 1975 for violations Section 120.25 of the Penal Law of the State of New York (Reckless Endangerment—First Degree); Section 110.00 of the Penal Law of the State of New York (Attempt to Com-

mit A Crime—Murder First Degree); Section 195.05 of the Penal Law of the State of New York (Obstructing Governmental Administration) and Section 205.30 of the Penal Law of the State of New York (Resisting Arrest) was of such improper nature as to warrant revocation, cancellation or suspension of his license pursuant to Rule 36, Paragraph N of the Rules of the State Liquor Authority (9 NYCRR 53.1 (n)).

6. Adverse license history of these premises while licensed to the present licensee, which includes the following:

August 7, 1974—Licensee by Notice of Pleading and Hearing charged with violation Section 106, subdivision 6 of the Alcoholic Beverage Control Law—suffering or permitting lewd and indecent performances on July 13, 1974—REVOCATION PROCEEDINGS PENDING.

7. That in view of the foregoing, it appears that the licensee cannot or will not properly supervise and operate these premises so as to prevent violations of law from occurring therein.

8. That a serious question is raised as to whether the licensee is a fit and proper person to hold a license for the sale of alcoholic beverages and whether the renewal of this license would create a high degree of risk in the administration and the enforcement of the Alcoholic Beverage Control Law."

After the completion of the revocation hearing on August 20, 1975, the renewal interview was held on said date. At the renewal interview, the motion of the respondent Authority to incorporate and include the record of the revocation proceeding as part of the renewal interview was granted by the Hearing Officer without objection by the attorney for the petitioner.

4. The Authority's Determination

Thereafter, at a regular meeting of the State Liquor Authority held on January 8, 1976, the Members thereof, having duly considered and appraised the testimony and evidence presented at the hearing held on September 13, 1974 and October 23, 1974, and having adopted the proposed findings prepared by Counsel at its meeting of October 16, 1975 on the first revocation proceeding; and, after duly considering the transcripts of the testimony of the hearing held on August 7, 1975 and August 20, 1975, the hearing officer's statements of findings, and all the proceedings had thereon, determined:

"First Proceeding:

Authority finds performance lewd and indecent *per se* and charge is sustained.

The appropriate penalty is 30 days forthwith plus a $1,000 bond claim.

Second Proceeding:

Authority finds performance in charge 1 lewd and indecent *per se.*

Hearing Officer's findings adopted and charges sustained.

The appropriate penalty is revocation plus a $1,000 bond claim. Order of Non-renewal to be entered—two year proscription on premises."

5. New York State Court Proceedings

At least twice during the course of the administrative proceedings against the appellant, he subpoenaed employees of the State Liquor Authority in order to establish a defense of selective enforcement. Each time, upon the motion of the appellee, the subpoenas were quashed and appellant was advised by the New York courts that

the defense of selective enforcement could not properly be raised at the administrative hearing, but must be raised initially in court subsequent to the administrative proceedings. (Appendix to this Motion 26-28, 29-30, 30-31.*) On May 25, 1977, such advice was affirmed following appeal of this issue to the Appellate Division, Third Department (App. 24, 25).

Following the Authority's final determination and imposition of penalty, appellant instituted a proceeding for their review in court; on March 29, 1976, the matter was duly transferred to the Appellate Division, Third Department, pursuant to section 7804, subdivision (g) of the N.Y. Civil Practice Law and Rules (App. 22-23).

On January 27, 1977, the appellant's motion for the appointment of a referee to try the alleged issue of selective enforcement was denied by the Appellate Division, Third Department, "on the grounds that the allegations in the moving papers [were] insufficient to warrant the relief requested" (App. 22).

On April 6, 1978, the Appellate Division, Third Department confirmed the determinations of the Authority (App. 18-21).

On June 8, 1978, the Court of Appeals denied appellant's leave to appeal the unanimous judgment of the Appellate Division, Third Department (App. 17).

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* Unless otherwise indicated references to the Appendix to this Motion shall be indicated by the designation "App" followed by the page number thereof.

ARGUMENT

I.

Appellant Failed to File His Notice of Appeal with the Court Possessed of the Record as Required by Rule 10.

Appellant's Jurisdictional Statement states at page 2 that the Notice of Appeal was filed with the N.Y. Appellate Division, Third Department; the copy of the Notice of Appeal appended to the Jurisdictional Statement at page 4 of its appendix indicates that the Notice of Appeal was also filed with the N.Y. Court of Appeals.

The letters set forth in the appendix to this motion at pages 32-3-- indicate that appellant has failed to file his Notice of Appeal in the court possessed of the record.

In failing to properly file his Notice of Appeal, appellant has failed to place this appeal within the jurisdiction of the Court.

II.

Appellant's Jurisdictional Statement Does Not Satisfy the Requirements of Rule 15.

Appellant's Jurisdictional Statement is materially defective in that it fails to contain the items required by the following sections of Rule 15 of the Rules of the Court:

1(b) a statement of the constitutional or statutory provisions believed to confer jurisdiction on the Court;

1(c) a statement of the questions presented by the appeal;

1(d) an adequate statement of the material facts of the case;

1(e) an adequate presentation with respect to the substantiality of the federal questions; and

1(h) copies of all opinions necessary for the Court to ascertain the grounds of the judgment or decree.

Appellant's failure to comply with the requirements of Rule 15 places his appeal without the jurisditcion of the Court.

III.

This Appeal Presents No Substantial Federal Question Warranting Review by This Court.

1. Appellant contends that section 106.6 of the Alcoholic Beverage Control Law is unconstitutionally vague for failure to give notice of proscribed conduct. The N.Y. Court of Appeals addressed and resolved this issue in *Matter of Beal Properties, Inc.* v. *State Liquor Authority,* 37 N.Y.2d 861, 378 N.Y.S.2d 43, 340 N.E.2d 476 (1975). In that case, the N.Y. Appellate Division, Third Department, had confirmed the Authority's determination that the corporate licensee had suffered or permitted the licensed premises to become disorderly on four specified dates in that it had suffered or permitted lewd and indecent performances thereon. *Matter of Beal Properties, Inc.* v. *State Liquor Authority,* 45 A.D.2d 906, 358 N.Y.S.2d 566 (1974). The N.Y. Court of Appeals reversed the Appellate Division on "so much of the dissenting in part opinion at the Appellate Division which concluded that, absent a regulation by the agency giving notice that conduct not lewd and indecent per se was proscribed, a sanction could not be imposed." In adopting the logic of Justice Cooke's dissent, The Court of Appeals answered the vagueness objection raised by the appellant in the instant proceeding:

> At the outset, it should be noted that the question of the power of the State Liquor Authority to prohibit conduct on licensed premises which does not meet the current tests of obscenity is not involved here. In California v. La Rue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, the Supreme Court indicated that First Amendment rights within licensed premises may be curtailed to the extent necessitated by other compelling governmental interests in preserving the order and morals of society. But, in acting to preserve the orderliness of licensed premises, the State Liquor Authority must comply with time-honored concepts of procedural due process of which notice of the proscribed conduct is the first essential. *If the type of conduct prohibited is limited to that which is obscene, there would be sufficient notice to the licensee as to what entertainment he may or may not permit on the premises since, under the decisions of the Supreme Court and our Court of Appeals, everyone is charged with knowledge of what is obscene* (see, e.g., Miller v. California, 413 U.S. 15, 27-28, n. 10, 93 S.Ct. 2607, 37 L.Ed.2d 419; Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793; People v. Heller, 33 N.Y.2d 314, 323, 327, 352 N.Y.S.2d 601, 608, 612, 307 N.E.2d 805, 809, 812). But, where the Authority chooses to exercise its power to prohibit conduct which does not meet the test of obscenity (see California v. La Rue, *supra*), it has the responsibility to provide licensees with notice as to the type of conduct on the premises which will subject them to revocation of their licenses and to the concomitant loss of income and, perhaps, of their livelihood. It would be intolerable under our system of jurisprudence to require the licensee to guess at its peril at the type of non-obscene entertainment it could provide (compare California v. La Rue, *supra,* 409 U.S. p. 110, 93 S.Ct. 390). *Matter of Beal, supra,* 45 A.D.2d at 907-908, 353 N.Y.S.2d at 568-569. (Emphasis added.)

The stringency of the construction adopted by the Court of Appeals is exhibited by its reversal of a charge which had been confirmed by all five justices of the Appellate Division:

> With respect to the events on July 27, 1972, there are insufficient findings by the agency. The only evidentiary finding adopted by the Authority is one by the hearing examiner that a patron was offended by the conduct which occurred on that particular day. Of course, there was considerable testimony by two witnesses concerning offensive conduct on that date, but *no finding of offensive conduct,* as distinguished from the subjective reaction of the patron, *was made by the examiner or the agency.* Matter of Beal, *supra,* 37 N.Y. 2d at 862, 378 N.Y.S.2d at 43, 340 N.E.2d at 476. (Emphasis added.)

Since this decision, the settled construction of section 106.6 of the N.Y. Alcoholic Beverage Control Law has been that, in the absence of a regulation, a charge of disorder based on lewd or indecent conduct may be sustained only upon the specific finding of the hearing examiner or of the Authority that the conduct suffered or permitted was lewd and indecent per se. (See *Matter of Salem Inn Inc.* v. *New York State Liquor Authority,* 43 N.Y.2d 713, 401 N.Y.S.2d 205, 372 N.E.2d 40 (1977); *Matter of Inside Straight, Inc.* v. *State Liquor Authority,* 56 A.D.2d 720, 392 N.Y.S.2d 770 (1977), mot for lv to app den 41 N.Y.2d 806 (1977); *Matter of Rubinoff* v. *State Liquor Authority,* 53 A.D.2d 943, 385 N.Y.S.2d 212 (1976), mot for lv to app den 40 N.Y.2d 802 (1976).

Under the above construction, appellant's question regarding the unconstitutional vagueness of section 106.6 of the N.Y. Alcoholic Beverage Control Law must fail as insubstantial, since the statute's prohibition against disorder on licensed premises reasonably encompasses, and

reasonably suggests to a person of ordinary intelligence, a prohibition against conduct which is lewd and indecent per se.

2. Appellant appears to contend at pages 7-8 of his Jurisdictional Statement that the charges against him were either brought or sustained on the basis of *ex post facto* regulations.

This contention is entirely without merit. The revocation proceedings brought against appellant were based upon the charges set forth at pages 4 and 5-6 of this motion, and not upon the regulations adopted by the Authority subsequent to the N. Y. Court of Appeals holding in *Matter of Beal,* 37 N.Y.2d 861, *supra.* Neither were the charges sustained on the basis of subsequent regulations. As is clearly indicated by the opinion of the Appellate Division, Third Department (App. 18-21), the charges against appellant involving lewd and indecent conduct were both brought and sustained under the statutory provision of 106.6 of the N. Y. Alcoholic Beverage Control Law.

3. Appellant contends at pages 9-10 of his Jurisdictional Statement that the N.Y. Appellate Division, Third Department, arbitrarily denied "his motion for appointment of a referee to consider the proofs offered" in support of allegations that he was the victim of selective enforcement by the Authority. However, appellant's Jurisdictional Statement fails to set forth factual allegations sufficient to constitute a claim of selective enforcement, fails to outline any of the proof he contends would support such allegations, and fails to specify with particularity the manner in which these factual allegations and offers of proof were brought to the attention of the Appellate Division.

Appellant's bare claim that his "proofs" of selective enforcement were arbitrarily refused by the Appellate

Division is insufficient to create a substantial federal question. Appellant must satisfy this Court (1) that his selective enforcement claim had some colorable basis, and (2) that the merits of his claim were properly brought before the Appellate Division. This appellant has not done.

In point of fact, the Appellate Division, Third Department, has on two occasions addressed the appellant's claim of selective enforcement. On the first, the Appellate Division found that the allegations contained in appellant's moving papers were insufficient to require the appointment of a referee (App. 22); on the second, the Appellate Division specifically found that appellant had presented no evidence of selective enforcement (App. 20).

It is apparent that appellant has been afforded ample opportunity by the New York courts to come forward with allegations and proof of selective enforcement; appellant's unsupported and inspecific allegations to the contrary are insufficient to warrant a plenary consideration of this question.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the Court below affirmed.

Respectfully submitted,

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Appendix A, Opinion of the Court of Appeals of the State of New York, Reported at 44 N.Y.2d 647.

COURT OF APPEALS

STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A.D. 1978.

Present, HON. CHARLES D. BREITEL,

Chief Judge, presiding.

3 Mo. No. 467

In the Matter of
the Application of David Bell,

Appellant,

For Judgment &c.

vs.

State Liquor Authority,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk of the Court.

Appendix B—Opinion of the New York Appellate Division, Third Department, Reported at 62 AD 2d 1066.

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

April 6, 1978 29941

In the Matter of DAVID BELL,

Petitioner,

v.

STATE LIQUOR AUTHORITY,

Respondent.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Sullivan County) to review determinations of the State Liquor Authority which (1) suspended petitioner's liquor license for a period of 30 days and directed forfeiture of his bond in the sum of $1,000; (2) revoked petitioner's license, together with forfeiture of his bond in the sum of $1,000; and (3) directed nonrenewal of petitioner's license for a period of two years.

In this proceeding, petitioner seeks review of two determinations made by respondent following statutory hearings. The first, rendered October 16, 1975, found petitioner in violation of subdivision 6 of section 106 of the Alcoholic Beverage Control Law when he had permitted his licensed premises to become disorderly on July 13, 1974 and July 14, 1974 in that he permitted lewd and indecent performances thereon. The second, rendered January 8, 1976, found petitioner in violation of subdivision 6 of

section 106 of the Alcoholic Beverage Control Law by permitting his licensed premises to become disorderly on July 3, 1975 and July 4, 1975 in that (1) he permitted lewd and indecedent performance thereon; (2) he permitted patrons and/or employees to bring upon the licensed premises narcotic and/or dangerous drugs; (3) he permitted solicitation for immoral purposes on the licensed premises; and (4) he permitted the licensed premises to be used for the purposes of promoting prostitution thereon. Respondent further found that "the conduct of the * * * [petitioner] leading to his arrest on July 4, 1975 for violations of Section 120.25 of the Penal Law of the State of New York (Reckless Endangerment-First Degree); Section 110.00 of the Penal Law of the State of New York (Attempt to Commit a Crime—Murder First Degree); Section 195.05 of the Penal Law of the State of New York (Obstructing Governmental Administration) and Section 205.30 of the Penal Law of the State of New York (Resisting Arrest) was of such improper nature as to warrant revocation, cancellation or suspension of his license pursuant to Rule 36, Paragraph N of the Rules of the State Liquor Authority".

The evidence adduced at the hearing revealed that the female entertainers danced completely naked while moving their hips and pelvic areas. They then laid down on the stage on their backs and spread their legs toward various patrons and placed their pelvic areas in close proximity to the faces of the patrons. The investigators testified that they were able to observe their vaginal areas surrounded by pubic hair. Unlike the situation in *Matter of Beal Props.* v. *State Liq. Auth.* (45 A D 2d 906, revd. 37 N Y 2d 861), the activity here was found to be indecent or lewd "per se" by the Authority and it is obvious that the activity engaged in was more than mere nude dancing.

Under identical circumstances, the Fourth Department upheld the State Liquor Authority's determination that such conduct was a violation of section 106 of the Alcoholic Beverage Control Law (*Matter of Inside Straight* v. *State Liq. Auth.*, 56 A D 2d 720), and the Court of Appeals refused to grant leave to appeal (37 N Y 2d 861).

In regard to the findings pertaining to the narcotics charges, permitting the solicitation for purposes of prostitution upon the licensed premises and the conduct of the licensee leading to his arrest for reckless endangerment, attempting to commit murder, obstructing governmental administration and resisting arrest, these presented questions of credibility which were for the respondent to resolve. In connection with the criminal charges, we note that the petitioner was convicted on April 20, 1976 in Sullivan County of the crimes of reckless endangerment in the second degree, a class A misdemeanor, in violation of section 120.20 of the Penal Law of the State of New York, and of the charge of resisting arrest, a class A misdemeanor, in violation of section 205.30 of the Penal Law of the State of New York. These convictions were affirmed by this court (*People* v. *Bell*, —— A D 2d —— [Dec. 29, 1977]).

We conclude that respondent's determinations of lewdness and indecency of the dance performances, as well as the remainder of the charges, are supported by substantial evidence in the record and the determinations of the respondent must therefore be upheld.

Petitioner argues that his rights are being violated in that the laws are being selectively enforced to his detriment. This hardly seems likely in view of the frequency with which these cases have reached the courts. But in any case, petitioner has presented no evidence of selective enforcement.

We have examined the remainder of petitioner's contentions and find them to be without merit. Under all the circumstances, we feel the penalty was appropriate.

Determinations confirmed, and petition dismissed, without costs.

MAHONEY, P.J., GREENBLOTT, MAIN, MIKOLL and HERLIHY, JJ., concur.

Appendix C, Opinion of the New York Appellate Division, Third Department (Unreported), dated January 27, 1977.

SUPREME COURT — APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

January 27, 1977

29941 — In the Matter of DAVID BELL, Petitioner,
v.
NEW YORK STATE LIQUOR AUTHORITY, Respondent.

Motion by petitioner, pursuant to CPLR 7804 (subd. [h]) for appointment of a referee to try an alleged issue of fact denied, without costs, on the ground that the allegations in the moving papers are insufficient to warrant the relief requested. Motion by respondent to dismiss proceeding for failure of prosecution granted, without costs, unless petitioner shall file and serve record and brief on or before February 25, 1977 in which event respondent's motion is denied.

KOREMAN, P. J., SWEENEY, KANE, MAIN and HERLIHY, JJ., concur.

Appendix D, Opinion of the New York State Supreme Court, Sullivan County (Unreported), dated March 29, 1976.

STATE OF NEW YORK

SUPREME COURT : COUNTY OF SULLIVAN

IN THE MATTER OF THE APPLICATION
OF
DAVID BELL,
Petitioner,

FOR JUDGMENT PURSUANT TO ART. 78 OF CPLR,

—against—

NEW YORK STATE LIQUOR AUTHORITY,
Respondent.

Supreme Court, Sullivan County Special Term,
February 13, 1976

Justice Roger J. Miner, Presiding

Calendar No. 42 and No. 93

APPEARANCES:

DAVID BELL, pro se
P. O. Box 130
Monticello, New York 12701
WILLIAM E. BANDON, ESQ.
Attorney for Respondent
30 Russell Road
Albany, New York 12206

Appendix D, Opinion of the New York State Supreme Court, Sullivan County (Unreported), dated March 29, 1976.

MINER, J:

This is a proceeding to review determinations made by respondent January 14, 1976:

(a) Revoking petitioner's license effective September 30, 1975 and directing forfeiture of bond in the penal sum of $1,000, as a result of alleged violations which occurred on July 3-4, 1975.

(b) Suspending petitioner's license for 30 days and directing forfeiture of additional bond in the penal sum of $1,000 for alleged violations which occurred on July 13-14, 1974.

(c) Prohibiting the issuance of a license to petitioner for a period of two years.

Petitioner's license expired as of September 30, 1975 and no application was made for a renewal thereof. It appears that respondent has remitted one of the two bond forfeitures described above. Both parties agreed, upon oral argument, that this proceeding should be referred to the Appellate Division, Third Department although petitioner asked that this court direct that the second bond forfeiture also be vacated.

Upon the record and the papers heretofore filed, the proceeding will be transferred to the Appellate Division, Third Department. (CPLR 7804, subd. (g).)

All papers are forwarded to the attorney for respondent for the preparation of an order to effect such transfer.

Dated: March 29, 1976.

Appendix E, Opinion of the New York Appellate Division, Third Department, 48 AD 2d 83.

In the Matter of David Bell, Appellant, v New York State Liquor Authority, Respondent.

New York State Liquor Authority, Respondent, v Beal Properties, Inc., Appellant. (And Five Other Related Actions.)

Third Department, May 22, 1975.

Sweeney, J. Appellants operate bars in Sullivan County under licenses issued by repondent. Separate proceedings were instituted to revoke appellants' licenses for violating subdivision 6 of section 106 of the Alcoholic Beverage Control Law. The chief defense to the charges urged by appellants is that respondent has violated the Fourteenth Amendment's equal protection clause by "selective enforcement" against their establishments. A revocation hearing was scheduled and, in order to establish this defense, Beal Properties subpoenaed six employees of respondent and David Bell subpoenaed two of the same six. The latter two appeared, testified and the hearing was adjourned. One of the subpoenaed witnesses was excused after he testified; no mention was made to the other about returning on the adjourned date and neither did. Motions were made to punish the two witnesses for contempt on failing to return on the adjourned date and also to restrain respondent from proceeding with the revocation hearing until appellants were permitted to present additional proof on their defense of selective enforcement. Respondent moved to quash the six outstanding subpoenas. Special Term denied appellants' motions and quashed the six subpoenas.

The principal issue raised on this appeal is whether the court erred in determining that the issue of unconstitutional selective enforcement could not properly be raised at the administrative hearing. In the event Special Term

is sustained on this appeal, appellants urge this court to establish a forum in which the defense can be raised properly.

If appellants were able to produce sufficient facts to establish a practice of selective enforcement by respondent, a valid constitutional defense would lie. (*People* v *Goodman,* 31 NY2d 262.) In our view, however, the hearing officer and Special Term properly refused to permit appellants to develop the defense of discriminatory selective enforcement at the administrative hearing level. Such questions must be submited to a judicial tribunal. (*Matter of Di Maggio* v *Brown,* 19 NY2d 283, 291-292.) The proper manner in which to develop such a defense is to raise it initially in an article 78 proceeding subsequent to the administrative hearing. If a triable issue of fact is thereby raised, the reviewing court may order it tried forthwith. (CPLR 7804, subd. [h]; 1 N.Y. Jur., Administrative Law, § 180.)

The orders and judgments should be affirmed, with costs.

Herlihy, P.J., Kane, Main and Reynolds, JJ., concur.

Orders and judgments affirmed, with costs.

Appendix F, Opinion of the New York State Supreme Court, Albany County (Unreported), dated December 17, 1974.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of the Application
of
HOWARD J. PIERCE
to Quash a Subpoena issued by David Bell.

In the Matter of the Application
of
RUTH A. LASHER
to Quash a Subpoena issued by David Bell.

(Supreme Court, Albany County Special Term, October 25, 1974)

(Calendar #166 & 167)

(JUSTICE JOHN L. LARKIN PRESIDING)

APPEARANCES: Eli Ratner, Esq., Counsel, State Liquor Authority of the State of New York, for the Petitioners, 30 Russell Road, Albany, New York 12206 (Joseph J. Micare, Esq., of counsel)

David Bell, pro se, P. O. Box 130, Monticello, New York 12701

Appendix F, Opinion of the New York State Supreme Court, Albany County (Unreported), dated December 17, 1974.

LARKIN, J.

These companion motions are brought on by order to show cause and seek to quash subpoenas issued to Ruth A. Lasher and Howard J. Pierce by David Bell. Ruth A. Lasher is a stenographer for the New York State Liquor Authority and apparently is the person who typed the investigation reports. She is a stenographer assigned to the Investigation Unit of the Zone II Office of the State Liquor Authority. Mr. Pierce is an Executive Officer of Zone II for the State Liquor Authority.

The underlying hearings giving rise to the instant motions were brought when charges were filed against the respondent David Bell, alleging that the respondent, a licensee, was conducting lewd and indecent shows at the licensed premises. On September 13, 1974 the hearings commenced in Monticello, New York, before a hearing officer of the State Liquor Authority. It appears without doubt that neither Mr. Pierce nor Ruth Lasher have any independent knowledge of the licensed premises or of the shows being conducted thereat, which are the subject to the hearings.

Mr. Bell has raised in partial defense the defense of "selective enforcement", that is, that certain licensed premises are being prosecuted for conducting these types of shows while other premises are not being prosecuted for conducting identical types of shows. Certain investigators of the State Liquor Authority appeared at the premises and observed the shows and presumably will testify as to the nature of the shows.

Both Thomas Spencer, a Chief Executive Officer of the State Liquor Authority and Paul Morello, Supervising Investigator of the State Liquor Authority were subpoenaed and testified. Neither of them had any independ-

Appendix F, Opinion of the New York State Supreme Court, Albany County (Unreported), dated December 17, 1974.

ent knowledge of the shows in question. The subpoena in question, to which this motion is addressed, was served on Mr. Pierce on October 15, 1974 but does not indicate where he was to appear nor the time he was to appear pursuant to the subpoena.

Having no independent knowledge of the licensed premises, it can only be presumed that the testimony of the subpoenaed persons is in regard to the "selective enforcement" defense. This Court determines that "selective enforcement" is not a defense to be litigated and raised in an administrative hearing. Nor does this Court determine that the testimony of Howard J. Pierce and Ruth A. Lasher would be material to the issues in the revocation hearing. A motion to quash an administrative subpoena is in effect a form of declaratory judgment. This Court determines that there has been no showing that the presence and testimony of either Howard J. Pierce or Ruth A. Lasher would contribute to the material and relevant testimony in the revocation hearing.

Accordingly, the motion to quash is granted in each instance. Petitioner submit order.

Dated: Kingston, New York
December 17, 1974

Appendix G, Opinion of the New York State Supreme Court, Rensselaer County (Unreported), dated October 29, 1974.

STATE OF NEW YORK

SUPREME COURT

COUNTY OF RENSSELAER

In the Matter of the Application of

MICHAEL ROTH, CHAIRMAN OF THE NEW YORK STATE LIQUOR AUTHORITY, to Quash a Subpoena Issued by David Bell.

(Supreme Court Special Term, Rensselaer County,

October 18, 1974)

(Justice John T. Casey, Presiding)

APPEARANCES: DAVID BELL, Pro Se
P. O. Box 130
Monticello, New York 12701
JOSEPH J. MICARE, Esq.
Assistant Counsel
New York State Liquor Authority
30 Russell Road
Albany, New York 12206

MEMORANDUM

CASEY, J.

From the bench, at a Special Term of this court, held on October 18, 1974, a motion by the Chairman of the State Liquor Authority was granted to quash certain subpoenas served by the owner of Beal Properties, Inc. on the Chairman and other officers of the Authority, which would have required their attendance at an administrative

Appendix G, Opinion of the New York State Supreme Court, Rensselaer County (Unreported), dated October 29, 1974.

hearing that is presently being conducted in regard to the type of entertainment that is being displayed in the Beal Properties places of business in Sullivan County. The purpose of the subpoenas was admittedly to show that the Board was selective in its prosecution and enforcement in regard to the alleged violations. This court stated at the Special Term at the time it granted the Chairman's motion that if such discriminatory practices are to be shown, an administrative hearing within the administrative agency is no forum for such determination. The hearing officer is not empowered to decide whether there has been selective and discriminatory prosecution or not. Accordingly, the motion to quash the subpoenas was granted and the owner's application to stay the administrative hearing was denied.

The owner now seeks reargument of that motion. After a review of the authorities nothing has been found or shown to this court to cause it to change or alter its original decision and the authority submitted and relied on by the owner is not to the contrary. Even if such authority were construed to be to the contrary this court would disagree with it.

Accordingly, the respondents motion for reargument is denied.

Dated: Troy, New York
October 29, 1974.

Appendix H, Letter from the Clerk of New York State Court of Appeals, dated October 4, 1978.

STATE OF NEW YORK
COURT OF APPEALS

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

October 4, 1978

Barry C. Plunkett, Esq.
State Liquor Authority
Agency Bldg. 2
Empire State Plaza
Albany, New York 12223

Re: Bell v. NYS Liquor Authority

Dear Mr. Plunkett:

I return herewith unsigned your proposed affidavit in the above title.

It may be helpful to you that I here state the general policy of this office with respect to original files as applicable to the Court's motion practice:

Any party may, of course, subpoena the file up to this Court for consideration on any motion. In the absence of subpoena by a party, the Clerk's Office will requisition the file (a) if requested to do so by an *indigent* party, upon a showing of indigency; or (b) if the Court requests the requisitioning; or (c) if the Court's need for the file is immediately evident.

The original file in the above title was not physically before the Court in connection with the motion for leave to appeal denied June 8, 1978.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

JG:tjw
encl.

Appendix I, Letter from the Clerk of the New York State Appellate Division, Third Department, dated October 4, 1978.

NEW YORK SUPREME COURT
APPELLATE DIVISION, THIRD DEPARTMENT
BOX 7288, CAPITOL STATION
ALBANY, N. Y. 12224

518-474-3609

JOHN J. O'BRIEN
CLERK

October 4, 1978

Leslie W. Trebby, Esq.
State Liquor Authority
Empire State Plaza
Albany, New York

Re: #29941—Matter of David Bell v. New York State Liquor Authority

Dear Mr. Trebby:

Pursuant to your telephone request, this is to certify that on April 12, 1978 this office forwarded to the County Clerk of Sullivan County the remittitur, consisting of the original record on appeal and a certified copy of this Court's order of confirmation of the determination of the State Liquor Authority. Remittal of the original record to the Sullivan County Clerk was made pursuant to CPLR 5524, inasmuch as the article 78 proceeding was originally commenced in Supreme Court, Sullivan County, and transferred to this Court by order of a Special Term of Supreme Court.

Very truly yours,

JOHN J. O'BRIEN
Clerk

JO'B/cs
CLERK ac 3,

Appendix J, Letter from the Sullivan County Court Clerk, dated October 5, 1978.

OFFICE OF THE SULLIVAN COUNTY CLERK

JOSEPH M. PURCELL, COUNTY CLERK

MONTICELLO, NEW YORK 12701

October 5, 1978

Mr. Leslie Trebby
N.Y.S. Liquor Authority
Counsel's Office
Agency Building #2
Empire State Plaza
Albany, New York 12223

Re: David Bell vs. N.Y. State Liquor Authority
Index Numbers 216/75 & 2275/76

Dear Mr. Trebby:

As per our telephone conversation where you requested information concerning the above entitled matter.
The transcripts in this action were returned to this office from the Appellate Division on April 17, 1978, and has remained in this office to date.
In further checking we find that as of this date a Notice of Appeal has not been filed in this office.
If we can be of further service to you, please do not hesitate to contact us immediately.

Sincerely yours,

Joseph M. Purcell
Sullivan County Clerk

JMP/eb

(63573)